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HAROLD B. WILL

No. 569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

BYRON E. BORING, *Petitioner*

v.

STATE OF OHIO, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above-entitled case on November 4, 1953, denying application for rehearing of orders entered October 14, 1953.

Opinions Below

The memorandum opinion of the trial judge, Court of Common Pleas of Muskingum County, overruling petitioner's motion for a new trial is unreported. The opinion of the Court of Appeals of Muskingum County is not reported. The order of the Supreme Court of Ohio dismissing the appeal is reported at 160 Ohio St. 188, 115 N. E. 2d 3.

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on October 14, 1953. Petitioner's application for rehearing was denied on November 4, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1251(1).

The federal questions sought to be reviewed were raised as follows:

(a) In the trial court, Court of Common Pleas of Muskingum County, by motion to dismiss count four of the indictment and by motion for a new trial (R.). The trial court denied both motions, the first motion orally from the bench (R.) and the second motion by opinion (R.).

(b) In the Court of Appeals of Muskingum County by assignments of error (R.). That court in its opinion ruled that these were not well taken and affirmed the judgment of the trial court (R.).

(c) In the Supreme Court of Ohio by Assignment of Errors in support of notice of appeal and support of motion for leave to appeal (R.). That court dismissed the appeal filed as of right, and denied leave to appeal, on the ground that no debatable constitutional question is involved (R.).

Question Presented

Whether petitioner's conviction for a criminal offense by a state court constitutes a denial of the due process of law guaranteed by the Fourteenth Amendment in that (1) petitioner's conviction was based upon the testimony of a critical witness who was not sworn, and (2) objection of petitioner's counsel at the trial was overcome by the misrepresentation of the prosecuting attorney that the witness had been sworn before a clerk and that he had been present at the time.

Statement

Petitioner, Byron E. Boring, was indicted under Section 13104 of the General Code of Ohio for the offense of obtaining property by false pretense and with intent to defraud. The indictment charged thirteen separate offenses, two of which were dismissed for lack of any evidence whatever. The jury acquitted petitioner on seven of the remaining eleven counts, and returned a verdict of guilty on four.

A key witness for the prosecution, June Shackelford (Braden) was not sworn. At the close of the State's case, counsel for the petitioner moved that count four be dismissed on the ground that the witness June Shackelford was not sworn.

Thereupon there ensued this colloquy: (Typed Tr. p. 412, R.)

> Counsel for the State: I will tell this court June Shackelford in the first place was sworn in as a witness, I was present.
>
> Counsel for the Defendant: When the witnesses were over there Mr. Barbour came over and said June Shackelford is not here but she will be here when it is time to testify.
>
> Counsel for State: She was sworn in by Raymond Crozier [Deputy Clerk], ask him.
>
> The Court: Witnesses frequently come in when not sworn, but they are sworn in by the Clerk's office before they enter the court room.
>
> Counsel for Defendant: If she was sworn in then we have no knowledge of it. I thought all witnesses had to be sworn in before the accused.
>
> The Court: No, they are frequently sworn in in the Clerk's office. They have to testify in the presence of the accused but that is all.

The Court ruled that the swearing in by the Clerk in his office was sufficient, and that defendant had not produced evidence that she was not sworn by a proper officer. (Typed Tr., p. 420, R.).

Petitioner was sentenced to the penitentiary on the four counts on which he had been found guilty, the sentences to run concurrently.

Petitioner filed a motion for a new trial, to which an affidavit by Raymond Crozier, deputy clerk of court of Muskingum County, Ohio, was attached in which affiant stated that to his personal knowledge June Shackelford (Braden) was not sworn before she gave her testimony. Petitioner's motion duly raised the question that accordingly the conviction was a denial of the due process of law guaranteed by the Fourteenth Amendment. The motion for new trial was overruled. (R.). On appeal, the Court of Appeals of Muskingum County affirmed the conviction. Its opinion on this question (R.) asserted (1) The trial court evidently found on the evidence before it that Shackelford was sworn; (2) The right to object to the use of unsworn testimony was waived; and (3) The testimony of this witness related to only one count of the indictment.

On October 14, 1953, the Supreme Court of Ohio dismissed the appeal filed as of right, and denied petitioner's motion for leave to appeal, on the ground that there was no debatable Constitutional question. A petition for rehearing was denied on November 4, 1953.

The witness June Shackelford Braden testified (Typed Tr. pp. 48-56, R.), that a promissory note and chattel mortgage, which purported to be signed by June Shackelford and witnessed by Petitioner, was not in fact signed by her. She further testified that she had never used her maiden name, June Shackelford, since her marriage to Kenneth Braden, who worked for Anchor Loan Company with his office in the petitioner's store. It was later shown that this note and mortgage were sold by Petitioner to Anchor Finance Company.

The charge of the trial judge instructed the jury that June Shackelford's testimony was relevant not only to the question of whether petitioner was guilty in count four of the indictment, charging that petitioner obtained money under false pretense in connection with the sale of the note and mortgage purportedly signed by the witness, but also

to his guilt or innocence on the other counts, on the question of "intent to defraud":

> An intent to defraud, in your consideration of a specific count of the indictment, may be shown by similar offenses which may have occurred at about the same time of the particular charge under consideration; and this is no less so even though such similar offenses, if any, may themselves be the subject matter of other charges against the defendant; the repetition or uniform course of acting, if any, being possibly suggestive of defendant's purpose or intent, if you should so find and consider . . . (Typed Tr. p. 497, R.).

Specification of Errors To Be Urged

The Supreme Court of Ohio erred:

1. In failing to set aside petitioner's conviction as contrary to the due process of law guaranteed by the Fourteenth Amendment, in view of the fact that petitioner's conviction was based upon testimony of a critical witness who was not sworn, and that objection of petitioner's counsel at the trial was overcome by misrepresentation of the prosecuting attorney that the witness had been sworn, in his presence, by the deputy clerk.

2. In failing to reverse the judgment of the Court of Appeal affirming the conviction on the ground that the trial court had found that the witness was sworn, and that the right to object to the use of unsworn testimony was waived, when such finding was based upon the misrepresentation of the prosecuting attorney.

3. In denying and dismissing appeal from the Court of Appeals of Muskingum County on the ground that no debatable constitutional question was involved.

Reasons For Granting The Writ

1. This case presents the substantial question of Federal law, whether petitioner's conviction for a criminal offense by a State court constitutes a denial of the due process of law guaranteed by the Fourteenth Amendment. The claim

of denial of due process is predicated on these facts: Petitioner's conviction was based upon testimony of a critical witness who was not sworn. The objection of petitioner's counsel, taken at the trial, was overcome by the misrepresentations of the prosecuting attorney that the witness (June Shackelford) had been sworn before deputy clerk Crozier and that he had been present when the oath was administered. The trial court overruled the petitioner's objection upon the ground that such a swearing in was proper.

2. The content of the phrase "due process of law" is

> "to be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Twining* v. *New Jersey,* 211 U. S. 78, 100 (1908)

3. Notice and hearing are the first foundations of due process of law. And it is a primary and indispensable element of a hearing that the witnesses be sworn.

There is no principle more deeply ingrained in the common law than that the men on whose evidence the rights of free men are adjudicated, shall be accountable, under the laws of God and man, for evidence falsely given. At every stage, in the evolution of the trial as we know it today, this principle of accountability was firmly adhered to. Originally the jurors were themselves the witnesses, and it was, indeed, on that account that they were sworn, and acquired the name "juror." Indeed, as sworn men, they were liable to harsh penalties for a perjured verdict. Oral testimony by others, where permitted in early procedures, was always given under the sanction of the oath. And as the modern concept of the respective functions of jury and witnesses emerged, the statute which created the right to compel testimony simultaneously created the statutory crime of perjury for false testimony given in the courts (5 Elizabeth

c. 9). In a case recently cited by this Court, the fundamental importance of the contention that witnesses had not been properly sworn was such as to merit review on a writ of coram nobis in the House of Lords. *O'Connell* v. *Regina*, 11 Cl. and Fin. 155, 255, cited in *United States* v. *Morgan*, No. 31, decided January 4, 1954.

4. The recognition of accountability of prosecution witnesses, whether secured by oath or affirmation, as an essential element of a fair trial has been asserted by all the state courts which have considered the matter. As the Supreme Court of Iowa said in *State* v. *Lugar*, 115 Iowa 268, 269, 88 N. W. 333 (1901):

> "From the very inception of judicial procedure down to the present time some form of oath, or some recognition of accountability for falsely testifying has been required by lawmakers and by Courts."

An oath, or affirmation, of witnesses is a *sine qua non* of a "hearing." In reversing an order removing a policeman for neglect of duty because the witnesses before the Police Commission had not been sworn, the New York Court of Appeals said

> "(The requirement of a hearing) . . . contemplates a judicial responsibility for perjury, or some protection to the accused against falsehood. The issue was one of fact. The proceeding was judicial in character, and hence the tribunal before which the investigation was had could not dispense with the usual form of procedure by acting upon statements not given under the responsibility of an oath." *People* ex rel. *Kasschau* v. *Police Commissioners*, 155 N. Y. 40, 44, 49 N. E. 257 (1898).

Compare, *State* v. *Lugar*, supra, in which the principle of accountability secured by oath or affirmation is integrated with another fundamental element of due process in criminal procedure, the right of confrontation (115 Iowa at 270, 88 N. W. at 334):

> "The Constitution of this state guarantees to every man accused of a crime the right to be confronted with the witnesses against him, and this would be but a barren right, and afford the defendant no protection if such witnesses may testify without being sworn, or without in any way being subject to the penalties of perjury."

New trials have been ordered where a witness for the state testified without being sworn, although this fact was not discovered by the defendant until after verdict. *State* v. *Taylor,* 57 W. Va. 228, 50 S. E. 247 (1905); *State* v. *Lugar,* supra; *Gibbons* v. *Territory,* 5 Okl. Cr. 212, 115 Pac. 129.

It is said "to be the duty of the court to see that the oath is administered to the witness, and that the Defendant has a right to presume that a witness taking the stand has been sworn, and that a party convicted on unsworn evidence has not enjoyed the protection of the laws to which he is entitled." *Barr* v. *State* (Miss.), not reported, 23 So. 628 (1898), citing *Hawks* v. *Baker,* 6 Me. 72 (1829).

In *State* v. *Taylor,* the court noted, 57 W. Va., at 236, 50 S. E. 247, 250:

> "An oath is a sanction which the law says shall accompany the testimony of every witness, and courts cannot be permitted to dispense with it even by oversight. It can make no difference that the omission was an innocent mistake. Its effect is the same as if it had been otherwise. The object of the oath is to bind the conscience of the witness, as well as to make his action in testifying amenable to the criminal law. Wilful violation of the truth after having taken the oath exposes him to both temporal and spiritual punishment. Moreover, the administration of it is a solemn admonition to the witness at the time he testifies, well calculated to keep alive in his mind a sense of his responsibility both to God and to the law."

5. Assuming that in a proper case the right to sworn testimony may be waived, it would be contrary to the due

process clause to determine that in the circumstances of this case petitioner has waived his right to be confronted with sworn testimony.

This Court has consistently held, in cases involving misrepresentations, either by prosecuting attorneys or judges, which adversely affect constitutional rights, that the state convictions cannot stand consistently with the due process clause of the Fourteenth Amendment, whether the misrepresentation "savors of foul play or carelessness." *Townsend* v. *Burke,* 334 U. S. 736, 740; *Palmer* v. *Ashe,* 342 U. S. 134; *Mooney* v. *Holohan,* 294 U. S. 103. In *Gibbs* v. *Burke,* 337 U. S. 773, this Court expressly called attention to the imposition upon defendant by the district attorney's use of incompetent evidence, including his own unsworn offer of proof concerning missing articles.

Not only did the court and prosecuting attorney fail to assure that the witness was sworn, but when the objection was raised by the defense attorney, it was overcome by the prosecuting attorney's misrepresentation that he had been present when the witness had been sworn by the clerk outside the court room. That misrepresentation resulted in the court's finding, without further inquiry, that the witness had been sworn.

That misrepresentation, and the court's resulting finding and ruling, cannot properly be the basis of denial of a constitutional right. A prosecuting attorney is not a mere adversary attorney; he is a sworn minister of justice. Petitioner was misled by an officer of the court on whose representations he was entitled to rely under our conception. Cf. *Langford* v. *U. S.,* 76 S. W. 111, (Ct. App. Ind. Terr. 1903). In that case a prosecution witness had not in fact been sworn. He brought this to the attention of the U. S. Attorney, before he took the stand, when he was recalled for rebuttal testimony. The U. S. Attorney replied, "You have already been sworn before." The Court reversed the conviction and ruled that the defendant could not be held to have waived this objection.

Where constitutional rights are concerned the state through its attorney cannot mislead the accused into believing that his rights have been protected, and then, consistent with due process, rely on the fact that the defendant was misled as a waiver of the right.

6. The state court alternatively sought to blunt petitioner's claim with the suggestion that the error was not prejudicial. An accused denied the safeguard of sworn testimony is denied due process of law without the necessity for speculation as to the exact weight which the jury assigned to the testimony of the unsworn witness. In *Gibbons* v. *Territory,* the court observed, 5 Okl. Cr. 233-234, 115 Pac., at 138:

> "The testimony of no witness should be received who has not been properly sworn. It might be argued that the testimony of the witness on the point received was not of serious importance. The court cannot always tell upon what particular testimony a jury bases its verdict, and a man on trial for his life or liberty is entitled to all of the protection of the law."

In this case, the testimony of witness Shackelford was used by the State as an integral part of its prosecution against petitioner on all four counts of which he was convicted. She testified directly as to the offense charged in Count Four. And under the trial court's charge the alleged offense, narrated by Shackelford, was a "similar offense" constituting evidence, if accepted by the jury, establishing necessary "intent to defraud", supporting its verdict on all counts of the indictment. (Typed Tr., p. 497, R.).

Thus, the denial of due process of law in use of the unsworn testimony of Shackelford infected the entire trial and conviction of petitioner. His imprisonment on the basis of this trial would be a deprivation of liberty in contravention of the Fourteenth Amendment.

Conclusion

In no particular is the due process clause of greater import in its guarantees than in the realm of procedure. Rulings which scoff at the importance of procedural safeguards or obviate their assurance by so-called waivers undermine the very foundation of the due process clause. In our republic, and under our Constitution, the testimony of sworn witnesses is the only basis upon which free men can be deprived of life or liberty.

This case presents a substantial constitutional question, meriting review by this Court.

Respectfully submitted,

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JURISDICTION.

Petitioner seeks to invoke the jurisdiction of this court under 28 U. S. C., Section 1257 (3). Other jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Whether petitioner has been denied due process of law under the Fourteenth Amendment by the jury's verdict of guilty on four counts of "obtaining property by false pretense", when the record discloses that, (1) some evidence was admitted on one count from a witness who, although the record recites she was sworn, petitioner moved for a dismissal of the count at the close of state's case believing she was not sworn, and (2) the motion to dismiss the count was overruled after only the bare statement of petitioner's counsel that she was not sworn, unsupported by any other information whatsoever; and the statement of the prosecuting attorney that he was present when she was sworn.

STATEMENT.

Byron E. Boring, the petitioner herein, was indicted upon thirteen counts for the crime of obtaining property by false pretense and with intent to defraud, contrary to Section 13104 of the General Code of Ohio. Two of these counts were dismissed for lack of evidence. The jury found the petitioner guilty on four of these counts and acquitted him on the other seven.

June Shackelford (Braden) testified on Wednesday, April 23. (R., p. 72.) Her testimony related to only one

count (the fourth count of the indictment) and was to the effect that she had never purchased any furniture from petitioner's store, the Home Furniture Company (R., p. 5), and consequently had not signed any promissory note and chattel mortgage, which were sold by petitioner to the Anchor Loan Company. (R., pp. 5 to 13.) Petitioner had signed as a witness to the purported signature of June Shackelford on the note and mortgage. (R., p. 55.) Five days later, on Monday, April 28, after the state had closed its case, petitioner moved that the fourth count of the indictment be dismissed on the alleged ground that the witness Shackelford had not been sworn. Petitioner offered nothing to the court to substantiate his contention other than his naked statement that the witness Shackelford had not been sworn (R., p. 63), while the prosecuting attorney said that the witness was sworn. (R., p. 64.) Petitioner not pursuing the point further, the court overruled the motion. (R., p. 66.) During the remainder of the trial, which ended on April 29, petitioner made no further mention of the swearing of the witness Shackelford. After the jury had rendered its verdict, the court sentenced the petitioner on the four counts on which he had been found guilty, the sentences to run concurrently. The day following the verdict of guilty, the petitioner's attorneys prepared an affidavit, which they had Raymond C. Crozier, one of the deputy clerks of court, sign. The affidavit recites "* * * to my personal knowledge * * * June Shackelford (Braden) was not sworn * * *." (R., p. 70.) Mr. Crozier is one of several deputy clerks who swear witnesses.

Petitioner then filed a motion for a new trial on various and general grounds, using as his only support to his contention that the witness Shackelford was not sworn, this

sole affidavit of Mr. Crozier. No attempt was made by petitioner or his attorneys to contact the witness Shackelford on this matter, although she was easily available. The motion for a new trial was overruled. (R., p. 71.) On appeal, the Court of Appeals of Muskingum county, Ohio, affirmed the conviction. Its opinion on this question (R., p. 79) states (1) the record shows that the witness Shackelford was sworn before she testified; (2) it does not appear in the record as to when and in what manner counsel for petitioner first obtained information to the effect that the witness had not been sworn; (3) during the trial, without objection, the petitioner cross-examined the witness Shackelford; (4) that the witness could have been sworn at any time by a person other than Raymond Crozier, a deputy clerk of courts, and, (5) that the testimony of the witness only had bearing on one count of the indictment.

On October 14, 1953, the Supreme Court of Ohio dismissed the appeal filed as of right and denied petitioner's motion for leave to appeal, on the ground that there was no debatable constitutional question. A petition for rehearing was denied on November 4, 1953.

The trial court in its charge to the jury included the following:

> "An intent to defraud * * * may be shown by similar offenses, which may have occurred **at about the same time** of the particular charge under consideration." (R., p. 74, emphasis supplied.)

The fourth count (Shackelford) related to the date of November 15, 1949. The other three counts upon which the petitioner was found guilty were dated as follows: Sixth count, February 27, 1950; tenth count, March 2, 1950; twelfth count, February 27, 1950.

ARGUMENT.

The question presented to this court involves the competency of evidence presented by one witness upon one count of four verdicts of guilty of a jury in a state court involving a state statute.

On the merits, applying all law and reason, the actions of the trial court, and the verdicts of guilty were correct. Petitioner now merely seeks to greatly magnify a few casual words at a lengthy trial, into an issue which is not present.

The admission of the testimony of the witness in question, testimony which the record recites was given under oath, is a question of procedure which has been affirmed by Ohio's highest court. No issue of due process is presented, all those fundamental requirements of the Fourteenth Amendment having been complied with.

I.

The Decisions Below Are Clearly Correct.

The first ruling that the trial court was asked to make on the issue was to whether or not June Shackelford (Braden) had been sworn, was on a motion to dismiss the fourth count in the indictment, after the state had rested its case, a full five days after June Shackelford (Braden) had testified and had been extensively cross-examined by the defense. At that time the defense stated that the witness Shackelford had not been sworn and the prosecuting attorney said that she had been sworn. (R., pp. 63, 64.) The court in dismissing the motion observed, "Witnesses frequently come in, when not sworn in the clerk's office

before they enter the court room." (R., p. 64.) The defense was self-contented with that simple statement that Shackelford had not been sworn, and did not concern themselves with supplying the court with the source of their information, the time when they had obtained such information, or the alleged basis for their contention that she had not been sworn. Petitioner now complains of that ruling of the trial court, overruling the motion to dismiss the fourth count in the indictment. But, were the defense attorneys, as officers of the court, diligent, and did they impart to the court knowledge (if such existed) that they were duty bound to give? Can the defense now take advantage of error (if any), which they themselves promoted and invited? This feeble and shielded attempt to dismiss the fourth count, five days after the witness had testified, was the only time during the course of the trial (trial lasted six days) that the defense even mentioned this issue. They were content to sit on the issue and idly cruise with it through the remainder of the trial, hopefully awaiting the expectant opportunity in the event of an adverse decision to resurrect the issue and attempt to give new life to their lost cause.

The next time that the defense raised the issue was on the motion for a new trial, after the defendant had been convicted upon four counts. Here the only supporting evidence for the contention that the witness Shackelford was not sworn was an affidavit prepared by the defense attorneys and signed by Raymond C. Crozier, one of the deputy clerks of court. (R., p. 70.) Even at this late date petitioner made no attempt to contact or obtain evidence from Shackelford as to whether or not she had been sworn, although she must have been well qualified to testify as to whether or not this was so. The court, in view of this

inadequate and vague evidence offered by the defense, which was clearly insufficient and did not seriously question the regularity of the trial, with true judicial determination, overruled this motion for a new trial.

A careful investigation of the facts herein involved discloses the following:

1. The record recites that the witness was sworn.

2. There is not definite proof that this witness was never sworn. Raymond Crozier, who made the aforementioned affidavit, is not the only deputy clerk of court. There are several other deputy clerks, as well as the clerk himself.

3. There is nothing to show that the testimony of June Shackelford (Braden) was falsely given in any manner.

4. The witness Shackelford was examined and cross-examined at length. She was treated by both parties the same as any other witness. Counsel for petitioner had ample opportunity to inquire into the testimony given by this witness; and he fully availed himself of that opportunity.

5. In their motion to dismiss the fourth count in the indictment, and in their motion for a new trial in the trial court, the defense did not even offer any evidence by the witness Shackelford, although she was available to them during all of these times. If their contention that the witness Shackelford was not sworn was as conclusive as they would lead us to believe, her testimony would have added greatly to their meager evidence.

So here we have a petitioner contending that he has conclusively proved that June Shackelford (Braden) was not sworn, and having as the sole basis for that enormous statement only the affidavit of Raymond Crozier, who was only one of those clerks swearing witnesses in the trial of this case.

While it is true that the prosecuting attorney stated that the witness Shackelford was sworn (which statement the prosecuting attorney still believes is the truth), there is no indication from the record or outside the record that petitioner or his attorneys relied upon that statement at any time, or for any length of time. Judging from the actions of the petitioner's attorneys, quite the converse appears to be true. Five days after the witness Shackelford testified, and after the state's case was closed, petitioner's attorneys, through some source bordering on clairvoyance, moved to dismiss her testimony on the ground that she had not been sworn, a most unusual ground.

Assuming that the witness Shackelford had not been sworn, does that action indicate sincerity and diligence on the part of the petitioner and his attorneys? Was this action of the petitioner timely? There is nothing in the record as to when or how the initial information was obtained. In considering the motion for a new trial, made on behalf of the petitioner, the trial court rendered a written opinion. (R., p. 72.) In this opinion, the court said:

> "There was some dispute and difference of opinion on the part of both sides as to the fact and no actual inquiry made by defense counsel of any one, including the deputy clerk in question or any other member of that office, or of anyone else, including June Braden herself, as to the actual fact, or since as to June Braden herself, the person best qualified to answer in view of the fact that there are several deputy clerks, as well as the Clerk himself.
>
> "There was then no disclosure, nor has there been since, by the defense, as to when and how it ascertained the information alleged on the afternoon of Monday, April 28, and therefore nothing to show that it acted timely upon such information, if true, when the defense first acquired knowledge of the question as to whether June Braden had been or had not been sworn as a witness when she testified five days earlier.

> In addition, the defense not only cross-examined her extensively, but has at no time made any motion, then or since, to strike her testimony, or any objection to any exhibits in any way, pertaining to her testimony, based on the ground that she had not been sworn."

Despite a complete silence on the part of counsel for the petitioner as to when they first obtained their claimed information concerning the witness Shackelford, the claim is made that error was committed in permitting the jury to consider the testimony of a witness who had not been sworn, alleging that objection was timely made.

Petitioner states that a witness must be sworn, that testimony of a witness that is not sworn is illegal and its admission error, although he admits in some cases the right to sworn testimony may be waived.

While there seems to be no objection to the general premise that witnesses ought to be sworn and should be sworn, certainly, in good conscience, counsel for the petitioner should not be permitted to take advantage of error, if any error did occur (which is not conceded), and thereby be permitted to upset a verdict of a jury given after due deliberation, following full examination and cross-examination of this and other witnesses.

In these circumstances, petitioner must necessarily fit into one of two situations. Either he was inadvertent and did not diligently inquire into the manner, since if the witness Shackelford had not been sworn, someone harbored that knowledge from the time she testified; or he patiently waited until five days after the witness Shackelford had testified for the state to rest and presented his motion to dismiss. Then to further insure his safety, petitioner waited until the jury was deliberating before even obtaining his affidavit. In either situation the result is the same. Petitioner's objection was not timely made.

The leading federal case on this point is **Beausoliel v. United States**, 107 F. 2d, 292, 71 App. D. C., 111 (C. A. D. C., 1939), the fifth syllabus of which provides:

> "Objection that witness was permitted to testify without being sworn, when fact was known to accused early enough so that he could have made timely objection, came too late on appeal."

The leading Ohio case states:

> "A party, who makes no objection to the introduction of evidence at the time is precluded from asserting at a later date error in the manner of its introduction and the fact that a witness was permitted, without objection, to testify without being sworn is no basis for reversal of a judgment." Title Guarantee and Trust Co. v. Welby, 78 O. A. 183, 69 N. E. 2d, 429, 430 (1946). (Court of Appeals of Ohio, Hamilton county.)

The leading state case on this point is **State v. Hope**, a case which, while not entirely directly in point, is very similar in many respects.

> 3rd Syllabus. "When defendant has cross examined a witness, he cannot object, on motion for a new trial, that the witness was not sworn, where there is nothing in the record to show when the fact was discovered by defendant." 13 S. W. 490, 8 L. R. A. 608. (Supreme Court of Missouri.)
>
> "The next assigned error rests on the claim that a witness testified on behalf of the state at the trial without having first been sworn. No objection on this ground was made at the hearing. It appears for the first time in the motion for a new trial and nothing in the record shows when the fact was discovered by defendant or his counsel. Had the point been suggested when the witness began his statement or during his examination, the irregularity or oversight of permitting him to testify, unsworn (if it existed) could have been easily and promptly rectified. But it was not suggested. After the witness had been examined

in chief, he was fully cross-examined on the part of the defendant. Thus, he was treated by both parties as in all respects fully qualified to testify. It has been held by other courts as well as our own, that where an oath is requisite to qualify a person as trier of the facts or of law, it may be waived by the competent parties in interest, either expressly (Howard v. Sexton, 4 N. Y. 157; Tucker v. Allen, 1871, 47 Mo. 488; Grant v. Holmes, 1881, 75 Mo. 109) or by going forward in the matter without inquiry or objection, (Arnold v. Arnold, 1866, 20 Iowa, 273, 275; Merrill v. St. Louis (1884), 83 Mo. 244, Cochran v. Bartle, 1887, 91 Mo. 636, 3 S. W. 854)." Cf. 13 S. W. 490, 492.

According to the following authorities, an irregularity in the course of trial will not be presumed.

In re DaRoza's Estate, 186 P. 2d, 725, 726 (Calif. C. of A., 1947):

"The Appellate Court must assume, in support of order appealed from, that appellee's witnesses were sworn, in absence of contrary evidence, and burden of showing that they were not sworn is on appellant complaining of trial court's consideration of their testimony on that ground."

Wigmore on Evidence, 3rd Ed., Sec. 1819, Volume 6, page 297:

"This modern practice does not abate the ordinary rule that the failure to make an objection to competency at the proper time is a waiver (ante sections 18,486). Hence, if a witness who has not taken the oath is by inadvertence put on the stand, the opponents subsequent discovery and objection should not avail * * *"

24 **C. J. S.**, Criminal Law, Sec. 1898, page 879:

"A conviction will not be reversed for errors occurring in the conduct of the trial, where notwithstanding the errors, substantial justice has been done the accused * * * the rule has been applied also to

irregularities and informalities in the oath administered to a witness for the prosecution * * * to the failure to swear witnesses."

The Court of Appeals of Ohio, Muskingum county, in affirming the trial court in its opinion said the following:

"It is clear from the record of this case that there was a definite course of conduct and a pattern of action which indicates clearly that these things did not occur by chance or error." (R., p. 78.)

"As to the first assignment of error, we find from the record that before June Shackelford testified it shows that she was duly sworn before testifying, and it was called to the attention of the Court at the close of the State's case that she had not been sworn. It does not appear in the record as to when and in what manner counsel for defendant first obtained information to the effect that the witness had not been sworn, and during the trial without objection he cross-examined said June Shackelford. It is claimed by said defendant that a Deputy Clerk of Courts by the name of Raymond Crozier said that Shackelford had not been sworn. However, a witness could be sworn at any time and by a person other than the Deputy Clerk of Courts, and the Court evidently passed on this question and found by the evidence introduced that the witness Shackelford had been sworn. (R., p. 79.) * * *"

The Ohio Supreme Court (**State of Ohio v. Boring**, 160 O. S., 188, 115 N. E. 2d, 3, 51 O. O., 448) dismissed the appeal in this case as follows:

"It is ordered and adjudged that this appeal as of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved."

In 51 O. O., 448, the editor's note concerning this case reads as follows:

"Error was claimed in permitting the jury to consider testimony of a witness who had not been sworn

before testifying. The Court held this related to only one count of the indictment, there could be no prejudicial error in defendant's conviction on the other three counts as her testimony related to only one and was to the effect she did not purchase the furniture or sign the note and chattel mortgage."

Briefly summarizing this case, we have a mere charge by the petitioner, that a witness was not sworn, a charge which is without any real foundation. The witness involved gave testimony which related in its entirety to only one of the four counts upon which the petitioner was found guilty. Each of the other three counts were based upon other independent evidence, and were based upon separate and distinct transactions.

A vain attempt is made by the petitioner to taint all four counts upon which petitioner was found guilty, with this unusual charge, that a witness was not sworn, in order to uphold his contention of prejudicial error.

II.

No Question of Denial of Due Process is Presented.

(a) The question of fact as to the competency of the evidence presented by the witness, June Shackelford (Braden), was passed upon by the trial court orally from the bench, only after the state rested. There the court's statement (R., p. 64) was, "Witnesses frequently come in when not sworn, but they are sworn in by the clerk's office before they enter the court room." The issue was again considered in the trial court's opinion (R., p. 71) overruling the motion for a new trial, and extensively considered in the Court of Appeals, Muskingum county, Ohio. (R., p. 75.) The question of the admission of the testimony was also considered in the Supreme Court of the state of

Ohio (R., p. 84), that court holding (R., p. 87) that "The same hereby is, dismissed for the reason no debatable constitutional question is included in said cause."

This court, in discussing due process of law, has had this to say:

> "Subject to the requirement of due process of law, the states are under no restriction as to their method of procedure in the administration of public justice. That the court had jurisdiction and that there was a full hearing upon the issue made * * * is not questioned. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law, * * * this Court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial and held them to be consistent with due process of law. Twining v. New Jersey, 211 U. S. 78 * * *" Jordan v. Massachusetts, 225 U. S. 167, 174 (1912).

Even the excerpt on due process adopted by petitioner (Brief, p. 6) continues:

> "It does not follow however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fostered upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment." Twining v. New Jersey, 211 U. S. 78, 100 (1908).

In **Allen v. Georgia,** 166 U. S., 138, 140 (1897), the following limitations upon a state's procedural due process were expressed by this court:

> "Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this Court would feel justified in say-

ing that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference. * * * It is no longer open to contention that the due process clause of the 14th Amendment to the constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, providing in the proceedings which are claimed, not to have been due process of law the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend. Iowa C. R. Co. v. Iowa, 160 U. S. 389; Wilson v. North Carolina, 169 U. S. 586.

"* * * When the essential elements of a court having jurisdiction in which opportunity for a hearing is afforded are present, the power of a state over its methods of procedure is substantially unrestricted by the due process clause of the constitution."

In 1948, **Bute v. Illinois**, 333 U. S., 640, 92 L. Ed., 986, wherein the question was that of the representative of the accused by counsel, was decided. This court in that case pointed out that "The underlying control over the procedure in any state court dealing with distinctly local offenses such as those here involved, consequently remains in the state." 333 U. S., 640, 652.

"The burden of establishing a delegation of power to the United States or the prohibition of power to the states is upon those making the claim. This point of view is material in the instant cases in interpreting the limitation which the Fourteenth Amendment places upon the process of law that may be practiced by the several states, including Illinois. In our opinion this limitation is descriptive of a broad regulatory power over each state and not of a major transfer by the states to the United States of the primary and pre-

existing power of the states over court procedures in state criminal cases. * * * Because the Constitution of the United States, during nearly eighty formative years, thus permitted each state to establish, maintain and accustom its people to that state's own forms of 'due process of law,' a substantial presumption arises in favor of, rather than against, the lawfulness of those procedures and in favor of their right to continued recognition by the Federal Government as 'due process of law.'" 333 U. S. 640, 653.

"The precise question here is whether the sentences in the two Illinois cases before us violated the Fourteenth Amendment. The Supreme Court of Illinois has affirmed both sentences supra * * * It has thus conclusively established their compliance with Illinois law." 333 U. S. 640, 668.

In view of these decisions it is respectfully submitted that the question raised by petitioner is one of a question of fact, concerning a witness which has been decided by the highest court of a state.

"It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glosser v. United States, 315 U. S., 60, 80, 86 L. Ed., 680, 704 (1942).

As has been pointed out, the record (R., p. 5) recites the witness was sworn, as was the determination by the trial court. Against this, petitioner urges the fact that the witness was not sworn (Brief, p. 4). In **Akins v. Texas**, 325 U. S., 398, 401, 402, 89 L. Ed., 1692, this court, in discussing such inconsistencies in the record stated:

"As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony. * * * Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a

reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect. Norris v. Alabama, 294 U. S. 587, 589, 590, 79 L. ed. 1074, 1076, 1077, 55 S. Ct. 579; Smith v. Texas, 311 U. S. 128, 130, 85 L. ed. 84, 86, 61 S. Ct. 164, we accord in that examination great respect to the conclusions of the state judiciary, Pierre v. Louisiana, 306 U. S. 354, 358, 83 L. ed. 757, 760, 59 S. Ct. 536. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness, which is at war with due process.' Lisenba v. California, 314 U. S. 219, 238, 86 L. ed. 166, 182, 62 S. Ct. 280, or equal protection."

For these reasons respondent believes the competency of evidence—the question being raised by a conflict of testimony in the record before this court—is a matter which has rightfully been placed in the realm of state's procedure. The question of fact as to what occurred and the question of the competence of what evidence was admitted both being questions not going to any due process requirements heretofore established but rather, being questions "of the states over court procedures in state criminal cases." **Bute**, *supra*, 333 U. S., 640, 653.

(b) State courts have recognized the issue of swearing a witness as being one of procedure regulating the admission of evidence. State statutes have been upheld dispensing with the necessity for oath in the case of children. As set forth in 58 **Am. Jur.**, 306:

"Even a child witness must be sworn, unless it is otherwise provided by statute, or the objection is

waived. People v. Winchella, 268 Mich. 123, 255 N. W. 735, 93 A. L. R. 805, cert. denied, 293 U. S. 619, 294 U. S. 717, 79 L. ed. 707, 1250, 55 S. Ct. 217, 345, 547."

"The statute authorizing the reception of the unsworn testimony of children under twelve years of age is not in derogation of any constitutional right of a citizen."

People v. Johnson, 185 N. Y., 228, 77 N. E., 1164; **People v. Sexton**, 187 N. Y., 495, 80 N. E., 396.

In **State v. Doud**, 225 P. 2d, 400, 408 (1950), the Supreme Court of Oregon, in referring to the above New York decisions stated:

"The court in those decisions declared that it knew of no constitutional provision which rendered admissible the testimony of only those who were under oath. We, likewise, are unaware of any."

"The statute in question extinguished no right, but simply so regulated the procedure as to admit the evidence of a child under the age of twelve years. * * *"

Johnson, *supra*, 77 N. E., 1164, 1168.

Respondent further believes that if petitioner's view of the facts are taken as true—that the witness was unsworn —and that the admission of such evidence is held to be a violation of petitioner's constitutional rights, in the face of the state's determination that such evidence was properly admitted or that any objection was not properly raised, then certainly the various states' determinations that they may properly legislate with reference to the admission of unsworn testimony would also by implication be held to have been in violation of the Federal Constitution.

III.

There is No Question as to the Prosecuting Attorney's Conduct.

Realizing that no constitutional questions exist on the merits of the case, petitioner now, for the first time in the proceeding, attempts to raise a question as to the conduct of the prosecuting attorney at the trial.

Petitioner participated in the testimony of the witness, June Shackelford (Braden). He cross-examined her at length; and they sat quietly by from Wednesday, April 23 (Typed Tr., pp. 1, 48), until Monday, April 28. (Typed Tr., pp. 328, 405.) Then, and only after the state had rested, did petitioner raise among numerous other questions (R., p. 63) the issue of the witness Shackelford's testimony. As to this, the trial court (R., pp. 72, 73) in its memorandum opinion, had this to say:

> "There was some dispute and difference of opinion on the part of both sides as to the fact and no actual inquiry made by the defense counsel of anyone, including the Deputy Clerk in question or any other member of that office, or of anyone else including June Braden herself as to the actual fact, nor since as to June Braden herself, the person best qualified to answer in view of the fact that there are several other Deputy Clerks, as well as the Clerk himself.
>
> "There was then no disclosure, nor has there been since, by the defense as to when or how it ascertained the information alleged on the afternoon of Monday, April 28th, and therefore nothing to show that it acted timely upon such information, if true, when the defense first acquired knowledge of any question as to whether June Braden had or had not been sworn as a witness when she testified five days earlier. In addition, the defense not only cross-examined her extensively but has at no time made any motion, then or since, to strike her testimony, or any objection to any

of the exhibits in any way pertaining to her testimony, based upon the ground that she had not been sworn.

"Under the foregoing circumstances, it is difficult to apprehend the reasoning that seeks to strike the charge in support of which evidence unquestioned and remaining in the record by deliberate choice and which was considered and acted upon by the jury without objection, enabling the jury to come to its own conclusion regarding the offense charged, the charge of which in the Indictment could in no possible manner be in any way related to the question as to whether or not a particular witness had been sworn before testifying.

"The Court, not being called upon in any manner at any time, to make any ruling with respect to the testimony of June Braden cannot at this time make any ruling pursuant to the action of the jury with reference thereto if it otherwise believes that the Jury was warranted from such evidence in returning the verdict of guilty with respect to the Fourth Count of the Indictment which the Court fully believes that the Jury was justified in doing."

This appraisal by the trial court, coupled with the status of the record certainly discloses no reliance on any statements of the prosecuting attorney, nor does it excuse petitioner's action. Certainly the question of fact can raise no federal question.

"The presence of the Judge, the State's attorney, and the Petitioner together with a natural wish on the part of Petitioner not to expand upon the shame of these crimes, provide no ground for a conclusion that there has been any failure, much less any constitutional failure, of fair judicial process. Doubts should be resolved in favor of the integrity, competence and proper performance of their official duties by the judge and the State's attorney. They were state officials lawfully chosen to discharge serious public responsibilities under their oaths of office. Especially in a self-governing state and nation, governmental stability depends upon the giving of full faith and

credit in form, substance and spirit to public acts, records and judicial proceedings not only among the states but among individuals and between their State and Federal Governments.

"Here also if any presumption is to be indulged it should be one of regularity rather than that of irregularity."

Bute, *supra*, 333 U. S., 640, 671, 672.

There is a legal presumption that public officers have done their duty. **United States v. Ross**, 92 U. S., 281, 23 L. Ed., 707 (1875).

"We must not overlook the fact that the human element cannot be entirely eliminated from the trial of lawsuits. While counsel, owe to the court, because of the position which he occupies, the utmost deference and respect, and while the court owes to them an equal obligation of courtesy and patience and consideration, nevertheless sharp differences of opinion do arise in the heat of trial and things are said which were better left unsaid. Such incidents are often regarded as trivial during the trial of a case and are quickly lost sight of, but, when set forth on the record and emphasized by counsel on appeal, they take on an importance which they never actually possessed. It is impossible to gather from the cold record, particularly when it is in narrative form, the atmosphere of the trial itself, the manner in which the words were spoken, or the probable effect, if any, which they had upon the merits of the controversy."

Goldstein v. United States, 63 F. 2d, 609, 613 (1933).

"The trial was long and the incidents relied on by petitioners few. We must guard against the magnification on appeal of instances which were of little importance in their setting."

Glosser, *supra*, 315 U. S., 60, 83, 86 L. Ed., 680, 706.

"The attempt to turn this trial of men whose guilt was abundantly proved, into a trial of governments

counsel, through a not infrequent expedient of defendants who have no other course, ought not, in our opinion, to succeed."

United States v. Dubrin, 93 F. 2d, 499, 506 (C. C. A., 2d Dist., 1937).

It is believed the absence of a federal question was pointedly summarized in **Buchalter v. New York**, 319 U. S., 427, 431, 87 L. Ed., 1492 (1943), by Mr. Justice Roberts, speaking for the court as follows:

"No such showing of suppression of evidence or connivance at perjury, as has heretofore been held to require corrective process on the part of the state, was shown.

"The speeches of counsel for defendants apparently provoked statements by the District Attorney of which petitioners now complain. This does not raise a due process question.

"As we have recently said 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice, and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' "

Considering the lengthy trial in the instant case and the statement of the trial judge, *supra*, as to the question of fact and his consideration of it, certainly no issue should now be made concerning the statement of the state's attorney to the court. Even in the magnification of this point at present, petitioner does not suggest the witness's testimony was untrue. It is believed a consideration of the entire trial and its human atmosphere will disclose attitudes on behalf of all concerned of complete fairness.

IV.

The Question of Possible Prejudice Was Properly Considered by the Lower Courts.

Ohio General Code Section 13449-5 (now Ohio Revised Code Section 2945.83) provides: "When New Trial Shall Not Be Granted.

> "No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any Court in case of any inaccuracy or imperfection in the indictment, information or warrant, provided that the charge be sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him; nor for any variance between the allegations and the proof thereof unless the accused is misled or prejudiced thereby; nor for the admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby; nor for any misdirection of the jury unless the accused was or may have been prejudiced thereby; **nor for any other cause whatsoever unless it shall affirmatively appear from the record that the accused was prejudiced thereby or was prevented from having a fair trial.**" (Emphasis supplied)

The question of the Shackelford testimony touched only the fourth count of the indictment. In addition to her testimony on this count, the testimony of three other witnesses (R., pp. 13, 26, 45) were upon the Shackelford count. These witnesses identified State's Exhibits 4a, 4b, 4c, 4d, 4e and 13a, all of which pertained to the fourth count and several of which contained petitioner's signature as a witness to the Shackelford signature. As to Exhibit 4d, the record card of the loan company showing

payments, the testimony, "B. P. on it meaning Byron paying" (R., p. 23) together with the witness, McCombs, who referred to the Shackelford account on cross examination as follows:

> "Q. Do you know in the case of the Shackelford account whether or not that was an unauthenticated account? A. Yes." (R., p. 44.)

In addition to the conviction on the above evidence, the jury returned verdicts of guilty on the sixth, tenth and twelfth counts of the indictment. The charge to the jury by the trial court referred to "similar offenses" which may have occurred **"at about the same time** of the particular charge under consideration." (R., p. 74, emphasis supplied.) Upon this point the trial court, in its memorandum opinion, had this to say (R., p. 74):

> "The Court in its charge on page 20, stating to the jury,
>
> "An intent to defraud, in your consideration of a specific count of the Indictment, may be shown by similar offenses which may have occurred at about the same time of the particular charge under consideration.
>
> "The Fourth Count related to the date of November 15, 1949, while the Sixth, Tenth and Twelfth Counts related respectively to the dates of February 27th, March 2nd and February 27th, 1950. Accordingly, the evidence pertaining to the Counts of three of four convictions, to-wit; Sixth, Tenth and Twelfth Counts, were all three concerning matters which occurred 'at about the same time,' while the matters related to the Fourth Count were wholly unconnected in the charge given by the Court as to what the jury might look in considering and determining the issue of intent to defraud, thereby resulting in two conclusions. The first is that the finding and determination of the Jury with respect to its verdict on the Sixth, Tenth and Twelfth Counts might properly have been derived in any particular one of those three with reference to

what it might have considered and determined with respect to the other two in no wise in any of the three could it have any way given consideration in any respect of intent to defraud with respect to the Braden testimony. At the same time, the fact that the Fourth Count was of a date wholly isolated from the dates of the evidence in the Sixth, Tenth and Twelfth Counts, clearly shows that the Jury concluded from the evidence relating to the Fourth Count in such evidence itself, the sufficiency of its conclusion of conviction with respect thereto and without recourse of consideration of other similar instances or offenses of the defendant in deciding that he was guilty under the Fourth Count of the Indictment."

Respondent believes that a review of the entire record indicates, as found by the state courts, the correctness of the verdict of the jury upon the more than five hundred pages of typewritten record.

"Where it appears from the entire record that the rights of the accused were not prejudiced and that is the situation here—the error must be regarded as harmless."

Pers v. Hudspeth, 110 F. 2d, 817, 822 (C. C. A. 10th, 1940).

For these reasons and under the procedural statutes of Ohio, the state courts' consideration of the effect of the evidence given by the witness Shackelford was proper.

CONCLUSION.

The record recites, and the trial court must have found, that the witness Shackelford was sworn.

The issue can be one of fact only, going to the competency of evidence adduced upon one of the four guilty verdicts of the jury. Upon the merits of the case, the lower courts have applied the correct principles and reasoning.

It is believed the issue of evidence is one of state court procedure in state criminal cases, and consequently does not involve any question of federal due process.

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1953

No. 569

BYRON E. BORING, *Petitioner*

v.

STATE OF OHIO, *Respondent*

REPLY BRIEF ON BEHALF OF PETITIONER

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1. Respondent contends (Resp. Br., p. 7) there is no proof that the witness Shackelford was not sworn; this is untrue. The affidavit of Raymond Crozier, deputy clerk, is decisive on the point; Crozier did not aver that the witness was not sworn *by him;* Crozier swore to his personal knowledge that Shackelford "was not sworn before she gave her testimony in said trial." (R., p. 70). The mere statement of the prosecuting attorney that the witness was sworn in his presence by Crozier (R., p. 64) is thus directly controverted by Crozier's sworn statement that the witness was 'not sworn."

2. There is no evidence whatever to support respondent's charges of delay and non-disclosure (Resp. Br., pp. 6-9).

Ohio practice permits swearing of witnesses outside of the courtroom (R., p. 64). It was not immediately obvious, therefore, that the witness had not been sworn. Petitioner's objection was made well within the time when it could have been readily ascertained by the court whether the witness was prepared to swear to the truth of her testimony. The plain fact is that the court and petitioner were both misled, and further inquiry forestalled, by the personal assurance of the prosecuting attorney that the witness was sworn in his presence.

In none of the cases cited by respondent (Resp. Br., pp. 10-11) was objection to unsworn testimony made until after trial. In all of the cases cited the appellant knew that the evidence was unsworn at the time it was offered.

The "modern practice" referred to by Wigmore, Third Edition, § 1819 (Resp. Br., p. 11) is the swearing of witnesses as a group *in open court* at the opening of a trial. In Section 1819(c) Wigmore poses, but does not answer, the "larger question" of "whether the omission of the oath without fault of the objector is an error material to require a new trial." It is precisely this question on which we now seek a decision by this Court.

3. Respondent cites three cases in which this Court upheld state procedure as consistent with due process of law: *Twining* v. *Jersey,* 211 U.S. 78 (1908); *Allen* v. *Georgia,* 166 U.S. 138 (1897); and *Bute* v. *Illinois,* 333 U.S. 640 (1948). In all of these cases actions *in conformity* with state procedures were in issue. In this case, the issue is not the Constitutionality of established procedure, but the legal consequences, under the Due Process Clause, of deviation from such procedure; for the State of Ohio, like all of its sister states, requires that witnesses be sworn or affirmed. Ohio Gen. Code § 11520.

4. Respondent cites *Glasser* v. *United States,* 315 U.S. 60 (1942) and *Akins* v. *Texas,* 325 U.S. 398 (1945) in support of the position that this Court will not retry an issue of fact. In the *Glasser* case, the "fact" involved was not

whether a constitutional safeguard had been observed. In *Akins,* the "fact" was Constitutional, *viz.,* alleged discrimination in impanelling a grand jury. The Texas court, however, had held a hearing expressly to determine whether there was discrimination, and found that there was none. In this case, the appellate courts of Ohio made no attempt to ascertain whether the witness Shackelford was sworn; and the trial court's ruling was made without inquiry, and with assurances by the prosecuting attorney that Shackelford had been sworn.

5. Respondent invokes the "presumption of regularity"—the presumption that public officers have done their duty—as a basis for upholding the decision below. (Resp. Br., pp. 20-22). We note that in respondent's view no such presumption inures to petitioner's benefit for purposes of evaluating the timeliness of his objection to the Shackelford testimony. Respondent's argument (Resp. Br., pp. 5-13) in effect denies that petitioner could, honestly and without negligence, have assumed, even temporarily, either that a witness put on the stand by the prosecution had been duly sworn outside the courtroom in accordance with Ohio practice, or that the prosecuting attorney's statements to the court were true.

6. Only two of the cases cited by respondent (Resp. Br., pp. 20-22) bear directly on the "presumption of regularity" invoked in support of the state court rulings: *Bute* v. *Illinois, supra,* and *United States* v. *Ross,* 92 U.S. 281 (1876). Neither provides authority for application of the presumption in this case. In *Bute* v. *Illinois,* this Court, in relying on the presumption, expressly noted the lack of "factual support" for appellant's position (333 U.S., at 671), and the "complete absence of any showing to the contrary" (333 U.S., at 672). In the *Ross* case, this Court reversed a Court of Claims decision on the ground that the lower court had allowed the "presumption of regularity" to replace proof. The view of this Court was expressed in the following language:

> The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. *United States* v. *Ross, supra,* p. 284.

CONCLUSION

At a time when difficult and disturbing questions are being raised by reliance in non-judicial proceedings on unsworn charges by informers, we submit that the role of the oath or affirmation as an integral element of due process in judicial proceedings is peculiarly important and timely. The issue is properly raised in this case and merits review by this Court.

If as we believe, a man cannot Constitutionally be deprived of life or liberty on unsworn testimony, then we are obliged to ask this Court, whether he can Constitutionally be held to have acquiesced in its use when his objection was over-ruled on the basis of the prosecuting attorney's misrepresentation that the witness was sworn.

Respectfully submitted,

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